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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/062,369
Filing Date: January 31, 2002
Appellant(s): BREESE ET AL.

Stephen J. Walder, Jr.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 27 October 2006 appealing from the Office action mailed 15 March 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

The amendment after final rejection filed on 15 May 2006 has been entered.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows.

NEW GROUND(S) OF REJECTION

Claims 30-59 are also rejected under 112 2nd paragraph for insufficient structure in regards to means-plus-function limitations under 112 6th.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,793,753	HERSHEY et al.	08-1998
6,397,359	CHANDRA et al.	05-2002
6,901,442	SCHWALLER et al.	05-2005
6,163,775	WLASCHIN et al.	12-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112 (New Ground of Rejection)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 30 – 59 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

1) Claims 30 and 45 are rejected under 35 USC § 112, ¶ 2, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim(s) recites/recite the following means (or step) plus function limitation: means for configuring a plurality of probes to execute a script for performing a transaction between a client computing device and a server computing device.

This limitation invokes 35 USC § 112, ¶ 6 because it meets the 3-prong analysis set forth in MPEP 2181 as it recites the phrase “means for” or “step for” (or appellant identifies the limitation as a means (or step) plus function limitation in the appeal brief) and the phrase is modified by functional language and it is not modified by sufficient structure, material, or acts for performing the recited function. Also see *Altiris Inc. v. Semantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003). 35 USC § 112, ¶ 6, requires such claim to be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. “If one employs means plus function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section § 112.” *In re Donaldson Co.*, 16 F.3d 1189, 1195, 29 USPQ 1845, 1850 (Fed. Cir. 1994)(in banc.). For a computer-implemented means-plus-function claim limitation that invokes 35 USC § 112, ¶ 6, the corresponding structure is required to be more than simply a general purpose computer. *Aristocrat Technologies, Inc. v. International Game Technology*, 521

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F.3d 1328, 1333, 86 USPQ2d 1235, 1239-40 (Fed. Cir. 2008). The corresponding structure for a computer-implemented function must include the algorithm as well as the general purpose computer. *WMS Gaming, Inc. v. International Game Technology*, 184 F.3d 1339, 51 USPQ2d 1385 (Fed. Cir. 1999). The written description must at least disclose the algorithm that transforms the general purpose microprocessor to a special purpose computer programmed to perform the claimed function. *Aristocrat*, 521 F.3d at 1338, 86 USPQ2d at 1242.

In the instant application, the following portions of the specification and drawings may appear to describe the corresponding structure for performing the claimed function: The computer system of Fig. 1 has at least one processor 110.

However, the specification and drawings do not disclose sufficient corresponding structure, material or acts for performing the claimed function. The specification discloses that the processor 110 performs claimed function. However, the specification does not set forth the code, software instructions or algorithm(s) executed in order to realize the claimed function. The spec merely states that "while the computer system described in Fig. 1 is capable of executing the processes described herein, this computer system is simply one example of a computer system (Spec. 6:13 – 17)." For a computer-implemented means-plus-function claim limitation that invokes 35 U.S.C. 112, sixth paragraph, the corresponding structure must include the algorithm or code, as well as the general purpose computer or microprocessor. As such, Appellants have failed to adequately describe sufficient structure for performing the function(s) claimed.

2) Claims 30 and 45 are also rejected under 35 USC § 112, ¶ 2, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim(s) recites/recite the following means (or step) plus function limitation: means for reporting said data.

This limitation invokes 35 USC § 112, ¶ 6 because it meets the 3-prong analysis set forth in MPEP 2181 as it recites the phrase "means for" or "step for" (or appellant identifies the limitation as a means (or step) plus function limitation in the appeal brief) and the phrase is modified by functional language and it is not modified by sufficient structure, material, or acts for performing the recited function. Also see *Altiris Inc. v. Semantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003). 35 USC § 112, ¶ 6, requires such claim to be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. "If one employs means plus function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section § 112." *In re Donaldson Co.*, 16 F.3d 1189, 1195, 29 USPQ 1845, 1850 (Fed. Cir. 1994)(in banc.). For a computer-implemented means-plus-function claim limitation that invokes 35 USC § 112, ¶ 6, the corresponding structure is required to be more than simply a general purpose computer. *Aristocrat Technologies, Inc. v. International Game Technology*, 521 F.3d 1328, 1333, 86 USPQ2d 1235, 1239-40 (Fed. Cir. 2008). The corresponding structure for a computer-implemented function must include the algorithm as well as the general purpose computer. *WMS Gaming, Inc. v. International Game Technology*, 184 F.3d 1339, 51 USPQ2d 1385 (Fed. Cir. 1999). The written description must at least disclose the algorithm that transforms the general purpose microprocessor to a special purpose computer programmed to perform the claimed function. *Aristocrat*, 521 F.3d at 1338, 86 USPQ2d at 1242.

In the instant application, the following portions of the specification and drawings may appear to describe the corresponding structure for performing the claimed function: Report generator 231 (Fig. 2) was implemented using the Perl scripting language and the AIX operating system.

However, the specification and drawings do not disclose sufficient corresponding structure, material or acts for performing the claimed function. The explanation is the same as that given above in regards to the configuration step.

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3) Claims 31 – 44 and 46 – 59 are rejected under 35 USC § 112, ¶ 2, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim(s) recites/recite the following means (or step) plus function limitation: see claims 30 and 45.

This limitation invokes 35 USC § 112, ¶ 6 because it meets the 3-prong analysis set forth in MPEP 2181 as it recites the phrase “means for” or “step for” (or appellant identifies the limitation as a means (or step) plus function limitation in the appeal brief) and the phrase is modified by functional language and it is not modified by sufficient structure, material, or acts for performing the recited function. Also see *Altiris Inc. v. Semantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003). 35 USC § 112, ¶ 6, requires such claim to be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. “If one employs means plus function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section § 112.” *In re Donaldson Co.*, 16 F.3d 1189, 1195, 29 USPQ 1845, 1850 (Fed. Cir. 1994)(in banc.). For a computer-implemented means-plus-function claim limitation that invokes 35 USC § 112, ¶ 6, the corresponding structure is required to be more than simply a general purpose computer. *Aristocrat Technologies, Inc. v. International Game Technology*, 521 F.3d 1328, 1333, 86 USPQ2d 1235, 1239-40 (Fed. Cir. 2008). The corresponding structure for a computer-implemented function must include the algorithm as well as the general purpose computer. *WMS Gaming, Inc. v. International Game Technology*, 184 F.3d 1339, 51 USPQ2d 1385 (Fed. Cir. 1999). The written description must at least disclose the algorithm that transforms the general purpose microprocessor to a special purpose computer programmed to perform the claimed function. *Aristocrat*, 521 F.3d at 1338, 86 USPQ2d at 1242.

In the instant application, the following portions of the specification and drawings may appear to describe the corresponding structure for performing the claimed function: see claims 30 and 45.

However, the specification and drawings do not disclose sufficient corresponding structure, material or acts for performing the claimed function. These claims depend from claims 30 or 45 and are rejected based on the same reasons as provided for that claim.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 3-7, 9, 12, 16, 17, 19-21, 23, 26, 29, 30, 32-36, 38, 41, 45, 47-51, 53, and 56

are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey et al. (5,793,753) in

view of Chandra et al. (6,397,359).

3. For claims 1, 30, 45, Hershey teach a method (abstract) for communicating performance information (col. 1, line 1 – col. 2, line 55), said method comprising:

- a. Configuring a plurality of probes (col. 3, lines 28 – 60) to monitor activities between a client computing device and a server computing device (col. 4, lines 30-44);
- b. Collecting data from the plurality of probes (col. 4, lines 44-60), including at least one local probe and at least one remote probe (Fig. 2; col. 3, lines 10-50); and
- c. Reporting said data (col. 2, lines 50-55), wherein reporting said data comprises generating a report regarding transaction activities (col. 5, lines 30-40).

4. Hershey does not expressly disclose configuring a plurality of probes to execute a script for performing a transaction, wherein the script comprises a plurality of transaction steps for performing the transaction. Hershey does not expressly disclose that the collected data is data representative of a performance of the transaction steps of the script executed by the plurality of probes, nor that the report comprises a plurality of transaction step entries, one entry for each transaction step of the script, having associated performance data collected from one or more of the at least one local probe or the at least one remote probe. Chandra teaches a method and system (abstract) of performance monitoring and network testing (col. 1, line 1 – col. 5, line 30) between local and remote nodes (col. 6, line 29 – col. 7, line 15), wherein test scripts are developed and sent to each node (col. 7, line 15 – col. 8, line 22), and wherein data is collected (col. 8, lines 22-35) and stored (col. 10, lines 60-61), to be reported (col. 13, lines 10-11) in association with specific script commands (col. 16, line 20 - col. 18, line 35), broken by local and remote views (col. 3, lines 45-47). At the time the invention was made, one of ordinary skill in

the art would have added Chandra script and reporting methods to Hershey to improve the monitoring process by allowing for new or custom applications (col. 1, line 54 – col. 2, line 10).

5. For claims 3, 32, 47, Hershey teaches that said reporting further comprises outputting a plurality of items chosen from: response time data, availability data, probe location, Internet Service Provider information, time of script execution, threshold values, service level agreement violations, and error messages (col. 4, lines 44-60).

6. For claims 4, 16, 17, 33, 48, Hershey does not expressly disclose comparing said data with at least one threshold value derived from a service level agreement, and reporting results of said comparing. Chandra teaches service level agreement monitoring (col. 14, line 39 – col. 15, line 16). At the time the invention was made, one of ordinary skill in the art would have combined the inventions for the reasons above and in order to provide analysis independent of certain factors (col. 14, lines 63-67).

7. For claims 5, 19, 34, 49, Hershey teaches providing an alert when said data indicates an error (Fig. 4, #47; col. 5, lines 55-60).

8. For claims 6, 20, 35, 50, Hershey teaches that said error is a measured response time value greater than a corresponding threshold value (col. 3, line 60 – col. 4, line 9).

9. For claims 7, 21, 36, 51, Hershey teaches that said alert is provided via a system management computer (col. 3, lines 50-60; col. 4, lines 10-20).

10. For claims 9, 23, 38, 53, Hershey teaches outputting in a special mode any measured response time value that is greater than the corresponding threshold value (col. 3, line 65 – col. 4, line 1; “appropriate display”).

11. Claims 26 and 29 are drawn to the limitations in claims 4 and 9. Therefore, since claims 4 and 9 are rejected, claims 26 and 29 are also rejected for the reasons above.

12. For claims 12, 41, 56, Hershey teaches outputting in a special mode an indication of an application's lack of availability (col. 4, lines 49-50; alarm condition = loss of signal).

13. Claims 2, 8, 10, 13, 15, 18, 22, 24, 27, 31, 37, 39, 42, 44, 46, 52, 54, 57, and 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey and Chandra as applied to claims 1, 16, 30, 45 above, and further in view of Schwaller et al. (6,901,442).

14. For claims 2, 18, 31, 46, Hershey teaches that said reporting further comprises reporting a first subset of said data that originates from said at least one local probe (Fig. 2, #22a), and reporting a second subset of said data that originates from said at least one remote probe (Fig. 2, #22b). Hershey and Chandra do not expressly disclose employing a similar reporting format for said first subset and said second subset, whereby comparison of said first subset and said second subset is facilitated. Schwaller teaches a method (abstract) of monitoring network nodes and reporting performance data (col. 1, line 1 – col. 6, line 20) in which the reporting method employs a similar reporting format for said first subset and said second subset (Fig. 9B), whereby comparison of said first subset and said second subset is facilitated (col. 14, lines 5-20). At the time the invention was made, one of ordinary skill in the art would have used Schwaller's GUI to improve reporting methods and further to allow administrators to better study data and locate problems (col. 15, lines 20-55).

15. For claims 8, 22, 37, 52, Hershey and Chandra do not expressly disclose providing a clearing message when said error no longer is detected. Schwaller teaches the negation of error

messages when trend measurements indicate improvement for the error message (col. 20, lines 35-45). At the time the invention was made, one of ordinary skill in the art would have added the clearing of error messages to Hershey and Chandra so that administrators may know which problems require attention (col. 17, lines 30-35).

16. For claims 10, 13, 24, 27, 39, 42, 54, 57, Hershey and Chandra do not expressly disclose that outputting in a special mode further comprises outputting in a special color. Schwaller teaches this limitation (col. 13, lines 55-65). At the time the invention was made, one of ordinary skill in the art would have added color coding to make error determination easier for administrators (col. 3, lines 3-5).

17. For claims 15, 44, 59, Hershey does not expressly disclose reporting results of each execution of the script by said plurality of probes, but does teach that the probes are programmable as to monitoring of the system (col. 5, lines 10-40). Schwaller teaches the reporting of test script results (col. 9, lines 30-50). At the time the invention was made, one of ordinary skill in the art would have added scripting in order to perform traffic simulation (col. 7, line 55 – col. 8, line 50) that is well known in legacy systems (col. 2, lines 20-35).

18. Claims 60-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hershey, Chandra, and Schwaller as applied to claims 15, 16, 26, 44, and 59 above, and further in view of Wlaschin et al. (6,163,775).

19. For claims 60-64, Hershey teaches outputting the reported results to a user (col. 5, lines 30-40), but does not expressly disclose the output of the report comprises a table. Chandra teaches a table report (Tables 3 and 4), but does not expressly disclose a table having at least one

row for each execution of the script and columns ordered according to an order of transaction steps in the script. Wlaschin teaches a method and system (abstract) of utilizing tables to report data (col. 1, line 1 – col. 3, line 30), wherein a structure of such type is utilized (col. 6, line 35 – col. 7, line 30) to store data of any type (abstract).

20. The remaining differences are only found in the non-functional data stored on the article of manufacture. Monitoring data and specific labels is not functionally related to the substrate of the article of manufacture. Thus, this descriptive material will not distinguish the claimed invention from the prior art in terms of patentability, *see Cf. In re Gulack*, 703 F.2d 1381, 1385, 217 USPQ 401, 404 (Fed. Cir. 1983); *In re Lowry*, 32 F.3d 1579, 32 USPQ2d 1031 (Fed. Cir. 1994).

21. Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to store any data in the fields of the article of manufacture as shown in Wlaschin because such data does not functionally relate to the substrate of the article of manufacture and merely labeling the data differently from that in the prior art would have been obvious matter of design choice. *See In re Kuhle*, 526 F.2d 553, 555, 188 USPQ 7, 9 (CCPA 1975).

22. At the time the invention was made, one of ordinary skill in the art would have used Wlaschin to order the data from Hershey and Chandra in order to improve functionality such as results searching (col. 1, line 66 – col. 2, line 10).

(10) Response to Argument

The following will respond to the arguments of the applicant:

Most of the arguments stem around the meaning of the terms transaction and transaction step. In the application, a script consists of one or more transactions, which in turn consists of a plurality of steps, such steps also potentially divisible into smaller units. There is no limitation regarding whether the transaction is functional programming (each step is a command) or object-oriented programming (each step is a unit with related events). (The examiner notes that network-based scripts may be either, according to the art of record.) There is also no limitation limiting the script and transaction from being the same item; a script may consist of a single transaction. The examiner accepted these definitions as such. Beyond that, the terms transaction, step and probe must be treated broadly.

In regards to Chandra's mention of transactions (P. 10-12), the hierarchy is what is important, and any teaching of a functionally equivalent programming hierarchy will read upon the teachings regardless of what they are called. In the art of record, other writings may refer to parts of the hierarchy using different terms. In particular, the art of record may use the term "transaction" to refer to any part of the aforementioned hierarchy. In other words, one of ordinary skill in the art cannot simply zero in on the term transaction and force upon it the application's definition. Instead, one must view the art as a whole, using the author's definition of transaction. One must also look for the hierarchical association, regardless of whether the term transaction is even used, and regardless of how the term of transaction is used.

Chandra's definition of transaction does not match the application's definition of transaction, and thus some translation is required. Chandra teaches that a testing application/schedule comprises multiple testing protocols, each of which comprises multiple testing scripts, each of which comprises multiple steps (col. 7, lines 15-50). The most common step is the connection, which consists of multiple transactions (Tables 1 and 4 both use a count as "the number of transactions run as part of the test (script, not protocol or schedule)"), but the steps may be any simulation of communications between associated endpoint node pairs (col. 6, line 67 – col. 7, line 1)," and can result in a staggering array of tests for which data is collected by step and even sub-step (col. 8, lines 15-50). Such scripts are explained by Patent 5,838,919 (Schwallier et al.), incorporated by reference by Chandra (col. 14, lines 30-40; col. 20, lines 40-45). Such breakdown is necessary not only to distinguish faults, but to fulfill Service Level Agreements (col. 14, lines 40-50).

Even in a connection process, there is a subdivision of steps. For example, Chandra teaches that an endpoint pair may test connections multiple times, which may then be used to determine averages at a later date (col. 15, lines 1-20). Alternatively, Chandra teaches that a connection test may include multiple connections over multiple pairs (col. 7, line 60 – col. 8, line 20), and each connection is monitored and reported upon. Thus, even in a functional step limitation, the separation by connection would still fulfill separating protocols into scripts into steps into transactions, and the hierarchy is taught.

In regards to applicant's argument that Chandra does not measure steps of a script (P. 9), the examiner has shown above that even measuring the performance of a connection as a whole will fulfill this limitation. Further, the connection itself is divisible either by object steps (client vs. server) or functional steps (transmission time vs. response time). Thus, this limitation is indeed fulfilled.

In regards to applicant's argument that Chandra does not teach a report with entries for each of the individual transactional steps (P. 9), Chandra teaches a variety of reports (Tables 1-4), including a connection analysis (by request), and a periodic report (by various connections, script and transaction count). Since there are reports on both connections and sub-steps of connections, this limitation is also fulfilled.

Applicant then argues that the particular layout of a data output is functional and thus may be patentable. Applicant states as evidence that from such a layout, "a user may follow the order of transaction steps... and may traverse each of the transaction steps." Or the user may not.

The test of functionality and patentability of a limitation is not whether a user draws functionality from the limitation, but whether the item is itself functional. See MPEP 2106.01. "Mere arrangements or compilations of facts and data, without any functional relationship," is not patentable, and neither are data structures that cannot cause functional change in a system.

Furthermore, suppose that the applicant or a third party switched the axes of the table, such that the report comprises a table having at least one row of a transaction step, and columns ordered according to script execution. Or suppose that the applicant or a third party simply dropped the table altogether in favor of a bulleted list. The examiner does not presume that it is the position of the applicant that both of these reports, each containing the same exact data, are patentably distinct inventions. Yet that would be the natural result of a rule in which the configuration of generated output is allowable, absent finding art with the precise configuration of output.

For the reasons above, the rejection should be maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of

rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) Maintain appeal. Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/Melvin H Pollack/

Examiner, Art Unit 2445

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/Jack Harvey/

Director, Technology Center 2400

Conferees:

/VIVEK SRIVASTAVA/

Supervisory Patent Examiner, Art Unit 2445

/PATRICE WINDER/

Primary Examiner, Art Unit 2445